IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Second Appeal No.626 of 2005
With
Civil Application No.1098 of 2003

Shri Moinuddin Nizamudding
Kharbe & ors. Appellants

Vs.

Shri Abdul Razzaque Jajmuddin Kuwari
and ors. Respondents

Mr.P.S.Dani for appellants.
Mrs.Anita Bhaktwani for Resp.Nos.1-1 to 1-7.

CORAM: B.H.MARLAPALLE, J.

Reserved on: June 5, 2007.
Pronounced on : June 15, 2007.

P.C.

1. This Second Appeal arises from the preliminary decree passed by the learned Jt. Civil Judge, Junior Division at Bhiwandi on 4/7/1998 in Regular Civil Suit No.127 of 1985 and confirmed by the lower Appellate Court in Civil Appeal No.134 of 1998 which came to be dismissed on 6/8/2003. The appeal has been waiting for admission for the last about four years or so and, therefore, it is being decided at the admission stage itself by referring to the R. & P. which has been received.

2. The respondents-plaintiffs had filed RCS No.127 of 1985 for perpetual injunction and possession in respect of the house bearing no.64 situated on CTS No.211 within the Bhiwandi Nizampur Municipal limits. It was claimed by the plaintiffs that the defendants had encroached upon a strip admeasuring 2 ft. x 76 ft. from House No.48, CTS No.210 situated on the Eastern side of House No.64 of CTS No.211. The deceased father of the plaintiff Shri Nijamuddin Haji Gulam Saheb Kuwari had let out house bearing Nos.48, 64 and 44 situated on CTS Nos.210, 211 and 212 respectively to one Shri Devichand Wanaji by an agreement dated 9/8/1934. Thereafter a new agreement was executed with Shri Shankarlal Kastoorchand in the year 1938 in respect of the suit property and he was permitted to construct a house on the land bearing CTS No.211 and tenancy was created in that respect. This Shankarlal Kastoorchand was the cousin of Shri Hansraj Trikamji. The ancestor of the plaintiffs had filed RCS No.205 of 1966 against Shankarlal and the said suit was dismissed. Civil Appeal No.37 of 1969 was also dismissed. Therefore, the plaintiffs filed Civil Application No.882 of 1971 before this Court and the same resulted in a compromise. As per the said

compromise the tenant agreed to surrender the houses bearing Nos.48 and 44 and the house no.64 located on CTS No.211 was agreed to be sold to the tenant for a consideration of Rs.5500/-. Accordingly a sale deed was executed and registered on 14/10/1974 (Exh.64) in respect of house no.64 situated on CTS No.211. The said sale deed has given the boundaries of house no.64. On the Northern and Southern side there are public roads whereas on the Eastern side City Survey No.210 with house no.48 and on the Western side City Survey No.212 with house no.44 is located. On the Northern side the plot size of CTS No.211 is 18 ft., East-West and on the Southern side the plot size is 26 ft. East-West whereas South-North it admeasures 75 ft.

3. The defendant filed Written Statement at Exhibit 25 and resisted the claim of the plaintiffs. The defendant stated that on Eastern as well as Western side of the suit house there were already common walls constructed and wooden pillars were grouted in the said walls so as to support the tin sheet roof of house no.64. It was further stated that in the said house a rice mill was running and the allegations that the defendants had encroached

upon a strip of 2 x 76 ft. was refuted. The trial Court considered the evidence and averments of the respective parties and held that there was an encroachment on the strip of land admeasuring 2 ft. x 76 ft. by the defendants and encroachment was on the land of CTS No.211. The defendants' plea of adverse possession as well as easementary rights was turned down and consequently the suit was decreed in terms of the following order:

> "The defendants do hand over the vacant possession of suit strip admeasuring 2' x 76' situated at the Eastern Side of H.No.64, on CTS No.211, 1st Nizampura, Bhiwandi, District Thane and at the western side of H.No.48, C.T.S. No.210, 1st Nizampura, Bhiwandi, District Thane to the plaintiff, within two months.
>
> The defendants/their servants, agents, representatives are hereby perpetually restrained from carrying out any sort of construction towards the suit strip mentioned in prayer clause (a) of the plaint."

. As noted earlier the lower Appellate Court dismissed the appeal by holding that the defendants could not prove their title to the suit property by adverse possession and that they had any right upon the suit property by easement.

4. It was implied by the pleadings of ownership by adverse possession and/or the right upon the suit property by easement that the defendants had conceded the encroachment on the strip of 2 ft. x 76 ft from CTS No.210. The defendants had purchased the suit house on 6/10/1980 by sale deed at Exhibit 88 and, therefore, they were not entitled to more area of CTS No.210 than what was stated in the sale deed at Exhibit 64. Before the trial Court on behalf of the plaintiffs, Plaintiff Mohd. Aarif Abdul Razak was examined as PW 1 whereas on behalf of the defendants DW 1 Moinuddin, DW 2 Champalal Hansraj and DW 3 Nazir Rafiq Pathan were examined. PW 1 stated in his depositions that there was a chapter case and the Executive Magistrate advised to undertake the measurement of the suit plot and accordingly on 25/7/1984 it was measured in the presence of plaintiffs and defendant Moinuddin and his son Nazir.

In the said measurement it was found that the strip of 2 ft. x 76 ft. from City Survey No.210 was included in City Survey No.211 and, therefore, when the plaintiffs called upon the defendants to surrender the said encroached area they denied and, therefore, the suit was filed. DW 2 - Champalal Hansraj is the defendants' vendor and he stated that the area of CTS No.211 as mentioned in the sale deed at Exhibit 64 was sold to the defendants by the sale deed at Exhibit 88 and he further pointed out that the wooden polls erected for construction of the house on CTS No.211, the area in the adjoining plots was not utilised. It has come in the evidence that on the Eastern side of CTS No.211 there was no common wall though on the Western side there was a wall supporting CTS Nos.211 and 212. Both the Courts below have recorded concurrent findings regarding the encroachment and in any case the defendants by taking the plea of adverse possession of easementary rights had impliedly admitted the said encroachment. The plea of adverse possession as well as easementary rights has been discarded by both the Courts below as there was no evidence to support the said plea or either of them. The encroachment of 2 ft. 76 ft. is a fact finding exercise based on the measurements

undertaken by a public officer as advised by the Executive Magistrate on 25/7/1984. This Second Appeal does not involve any substantial question of law and more so when the alternative defence to hold on the encroached portion taken by the defendants has been rejected by both the Courts below .

5. Hence the Second Appeal fails at the threshold and the same is hereby dismissed.

6. Civil Application does not survive and the same stands dismissed.

(B.H.MARL